Supreme Court, U. S.
FILED
MAY 18 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, ET AL.,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North LaSalle Street,
Chicago, Illinois 60601 (793-3500),
Attorney for Petitioners.

ROBERT J. O'ROURKE,
Deputy Assistant Attorney General,

FRED F. HERZOG,
First Assistant Attorney General,

JOHN W. FREELS,
Special Assistant Attorney General,

JERRALD B. ABRAMS,
Assistant Attorney General,
Of Counsel.

Printed by the Authority of the State of Illinois 56

PETITION FOR CERTIORARI FILED JANUARY 3, 1973
CERTIORARI GRANTED APRIL 2, 1973

INDEX.

PAGE

Opinions Below 1

Jurisdiction 1

Constitutional Provisions 2

Statutory Provisions 2

Questions Presented 2

Statement of the Case 4

Summary of Argument 8

Argument

I. Under Our Dual System of Federal and State Courts, the Proper and Independent Functioning of a State Court Judge Is Assured by the Principles of Comity, Federalism and Mutual Respect. Under Those Doctrines, a State Court Judge, in the Exercise of His Discretionary Powers, Is Not Subject to Interference and Regulation Merely Because He Holds a State Office or Because Someone May Speculate That in the Future He Might Engage in Discriminatory Conduct Against Some Unknown and Unnamed Individual. Under Those Principles, the Record Here Does Not Support the Judgment Against These Petitioners 9

II. Members of the Alleged Class Have Suffered No Injury by Actions of Either Judge, and, Hence Have No Standing in Court 15

III. The Common Law Doctrine Providing Civil Judicial Immunity for Judicial Acts Was Not Abolished by Congressional Civil Rights Enactments, Regardless of Whether Damages or Mandatory Injunctive Relief Is Sought 18

A. The Decision Below Permits the Intimidation of State Court Judges and Deprives the State of an Independent and Intellectually Free Judicial System 18

B. There Is No Historical Basis for the Abolition of Judicial Immunity 23

C. The Cases Speaking of the Abolition of Judicial Immunity Are Misconceived 29

D. The Weight of Case Law Supports Judicial Immunity 34

IV. The Decision Below Violates the Historic Comity Relationship Between Federal and State Judicial Systems 37

V. The Abolition of Judicial Immunity in Actions Seeking Permanent Injunctions Would Violate the Constitutional Guaranty to the States of a Republican Form of Government 42

Conclusion 45

CITATIONS.

Anderson v. Kelly, 32 F. R. D. 355 (D. C., Ga. 1963) .. 15

Bauers v. Heisel, 361 2d 581 (3rd Cir., 1966) 34, 43

Boyle v. Landry, 401 U. S. 77 (1971) 12

Bradley v. Fisher, 80 U. S. (13 Wall.) 335, 80 U. S. 649 (1871) 18, 24, 26

Bramlett v. Peterson, 307 F. Supp. 1311 (D. C., Fla. 1969) 29, 30

Cade v. Carpenter, 367, F. 2d 572 (5th Cir. 1966) 36

Cassidy v. Cecci, 320 F. Supp. 223 (E. D. Wis. 1970) .. 33

Collins v. Moore, 441 F. 2d 550 (5th Cir. 1971) 36
Conley v. Gibson, 29 F. R. D. 519 (D. C. Tex. 1961) .. 15
Cooper v. Aaron, 358 U. S. 1 31
Douglas v. City of Jeannette, 319 U. S. 157 (1943) .. 33
Duncan v. McCall, 139 U. S. 449 (1891) 43
Ex parte Chetwood, 165 U. S. 443 (1897) 39
Ex parte Virginia, 100 U. S. 339 (1879) 30, 33, 41
Floyd v. Barker, 12 Coke 25 19
Gaito v. Ellenbogen, 425 F. 2d 845 (3rd Cir. 1970) .. 36
Ganyer v. Peyton, 379 F. 2d 710 (4th Cir. 1967) 39
Gay v. Heller, 252 F. 2d 313 (5th Cir. 1958) 35
Greenwood v. Peacock, 384 U. S. 808 (1966) 21, 22, 38
Hadnott v. Amos, 394 U. S. 358 (1969) 30
Hagan v. State of California, 265 F. Supp. 174 (C. D. Cal. 1967) 35
Haley v. Troy, 338 F. Supp. 794 (D. C. Mass. 1972) .. 33
Holshouser v. Scott, 335 F. Supp. 928 (D. C. N. C. 1971) 43
In re Herndon, 394 U. S. 399 (1969) 30
In re Wallace, 170 F. Supp. 63 (M. D. Ala. 1959) 31
Johnson v. MacCoy, 278 F. 2d 37 (9th Cir. 1960) 35
Kansas City, Mo. v. Williams, 203 F. 2d 47 (8th Cir. 1953), Cert. denied 346 U. S. 826 15
Koen v. Long, 302 F. Supp. 1383 (E. D. Mo. 1969) 33
Lucas v. Forty-Fourth General Assembly of the State of Colorado, 377 U. S. 713 31
Lynch v. Snepp, 472 F. 2d 769 (4th Cir. 1973) 38
McKay v. Nesbett, 285 F. Supp. 498, 502, 503 (D. C. Alaska 1968) aff'd. 412 F. 2d 846 (1969) 34, 35

Mercedes v. Barrett, 453 F. 2d 391 (3rd Cir. 1971).... 13
Mitchum v. Foster, 407 U. S. 225, 32 L. Ed. 2d 705 (1972) 35, 37, 40, 41
Monroe v. Pape, 365 U. S. 167 (1961) 23, 24
Negrich v. Hahn, 379 F. 2d 213 (3rd Cir., 1967) 13
Phillips v. Cole, 298 F. Supp. 1049 (N. D. Miss. 1968) 29, 32
Pierson v. Ray, 386 U. S. 547, 554, 555 (1967)..... .....3, 24, 25, 26, 30, 34, 41
Rhodes v. Houston, 309 F. 2d 959 (8th Cir. 1962) aff'g. 202 F. Supp. 624 (D. Neb. 1962) 36
Robinson v. McCorkle, 462 F. 2d 111 (3rd Cir., 1972).. 13
Scott v. Stanfield, L. R. 3 Ex. 220, 223 (1868) 27
Sierra Club v. Morton, 405 U. S. 727, 31 L. Ed. 2d 636 (1972) 16
Sires v. Cole, 320 F. 2d 877 (9th Cir. 1963) 35
Smith v. Hill, 285 F. Supp. 556 (E. D. N. C. 1968) 33
Stambler v. Dillon, 288 F. Supp. 646 (S. D. N. Y. 1968) 33
Tate v. Arnold, 223 F. 2d 782 (8th Cir. 1955) 36
Taylor v. Beckam, 178 U. S. 548 (1899) 43
Taylor v. Taintor, 16 Wall. 366 (1873) 39
Tenney v. Brandhove, 351 U. S. 367 (1951) 25
United States v. Clark, 249 F. Supp. 720 (S. D. Ala. 1965) 29, 30
United States v. Downey, 195 F. Supp. 581 (D. C. Ill. 1961) 43
United States ex rel. Hoge v. Bolsinger, 211 F. Supp. 199 (W. D. Pa., 1962) aff'd. 311 F. 2d 215 (3rd Cir. 1962) 13

United States v. McLeod, 385 F. 2d 734 (5th Cir. 1967) 29, 32

United States v. Wood, 295 F. 2d 772 (5th Cir. 1961) .. 30

University Day Care Center, Inc. v. Temple University, 442 F. 2d 1116 (3rd Cir. 1971) 39

Wilson v. Kelley, 294 F. Supp. 1005 (D. C. Ga. 1968) aff'd. 393 U. S. 266 16

Yates v. Lansing, 5 Johns, 291 26

Younger v. Harris, 401 U. S. 37 (1971) 33, 37, 39

MISCELLANEOUS.

The Federalist, pp. 236, 303-305, 488 et seq.; 494 et seq. 44

66 Harv. L. Rev. 1285, 1296, N. 54 (1953) 44

Congressional Globe, 39th Cong., 1st Sess. (1866), pp. 475, 602, 1267, 1778, 1782 24

Congressional Globe, 38th Cong., 1st Sess. (1866) at 1680 24

De Tocqueville, 1 Democracy in America, 280 (Alfred A. Knopf, 1945) 16

E. C. S. Wade and Godfrey Phillips, Constitutional Law, Longman Group Ltd., London, 8th Edition, 1970; p. 330 26

D. Thompson, "Judicial Immunity and the Protection of Justices" Modern Law Review, Stevens and Sons Ltd., 1958, p. 517 27

Maitland, F. W. Equity, A Course of Lectures, Cambridge Press, c. 1936 27

Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States, 226, 299 (Freund ed., 1971) 39

Comment, Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent, 380 Chi. L. Rev. 612-13 (1971) 39

UNITED STATES CONSTITUTION AND STATUTES.

Article IV, Section 4.
42 U. S. C. §§ 1971, 1981, 1982, 1983 & 1985 ..... 4, 7
First Amendment 4
Eighth Amendment 4
Thirteenth Amendment 4
Fourteenth Amendment 4

Civil Rights Act 1866 (April 9, 1866, 14 Stat. 27) § 2 .....7, 23

Ku Klux Klan Act of 1871 (April 20, ch. 22, 17 Stat. 13) 7, 23

STATE CONSTITUTION.

Constitution of Illinois, 1970, Article VI, § 15 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, ET AL.,

Petitioners,

vs.

EZELL LITTLETON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 468 F. 2d 389 and appears in full in the Appendix to the Petition for Certiorari (A1). The Opinion of the District Court for the Eastern District of Illinois is not reported and appears in full in the Appendix to the Petition for Certiorari (A1).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. This Court's jurisdiction was invoked under 28 U. S. C. § 1254(1). The Petition for Writ of Certiorari was filed on January 3, 1973, and granted on April 2, 1973.

CONSTITUTIONAL PROVISIONS.

Article IV, Section 4 of the Constitution of the United States provides in pertinent part:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

STATUTORY PROVISIONS.

Sections 1981, 1982, 1983 and 1985 of 42 U. S. C. appear in full in the Appendix to the Petition for Certiorari (A1), pp. 61-63.

QUESTIONS PRESENTED.

1. Whether a state court judge or other state officer holding a constitutional office, is subject to interference or regulation by a United States district court merely because he holds a state office, especially in the absence of any specific allegations or proof of discrimination on his part?
2. Whether an alleged class, made up of both blacks and whites has any standing to enjoin a state court judge where there is no allegation that any member of the alleged class had ever been before the judge or suffered any discrimination at his hands and where the complaint alleged only that they speculated he might sentence blacks to longer sentences than whites?
3. Whether a class may maintain an action for mandatory injunction against a state court judge for an alleged

past discriminatory predisposition upon a complaint which alleges only general and conclusory allegations and evidences no instance of such conduct?

4. Whether the common law doctrine providing for judicial immunity for judicial acts in the exercise of legal discretion was abolished by Congressional civil rights enactments in instances in which mandatory injunctive relief is sought?

5. Whether the decision of the Court of Appeals for the Seventh Circuit which places state court judges under permanent injunction as to all bail orders and criminal sentences, destroys the constitutional basis of the federal-state relationship and transcends this Court's ruling in *Pierson* v. *Ray*, 386 U. S. 547 (1967), so as to violate the Guaranty of Republican Form of Government Clause of the United States Constitution, Art. IV, § 4?

6. Whether the decision of the Seventh Circuit which places state judges under permanent injunction, subject to the supervision of the United States district court with regard to all bail orders and criminal sentences, violates the decisions of this Court requiring lower federal courts to abstain from interference by injunction with the criminal law processes of a state?

7. Whether in view of the historic comity relationship between federal and state judicial systems, a federal district judge may establish guidelines to control the exercise of lawful state judicial discretion in future criminal matters based upon a civil suit in equity generally alleging a past discriminatory predisposition to that class?

STATEMENT OF THE CASE.

This civil rights suit was brought by plaintiffs on behalf of an undefined class, of which they were not members, charging that defendants Michael O'Shea, as Magistrate of the Circuit Court of Alexander County, Illinois, and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois, systematically discriminate against members of their class on the basis of race. This action, brought under the aegis of 42 U. S. C. §§ 1981, 1982, 1983, and 1985 and alleged interference with plaintiffs' First, Sixth, Eighth, Thirteenth and Fourteenth Amendment rights, sought mandatory injunctive relief against O'Shea and Spomer in their official capacity as members of the Illinois judiciary.

The Amended Complaint in the first, second, third, and fourth claims for relief set out eleven specific acts of alleged discriminatory conduct on the part of defendant State's Attorney Berbling[1] and investigator Shepherd.[2] The sixth claim for relief comprises general and conclusory allegations of "pattern[s] and practice[s] of [discrimina-

1. State's Attorney Berbling was succeeded in that office by W. C. Spomer.

2. Original defendants, State's Attorney Berbling and investigator Shepherd, the only defendants against whom specific charges of misconduct were made, are not parties in the case now before this Court. Motions made by those two defendants for a stay of mandate were denied by this Court, and their petition for a writ of certiorari, filed in Case No. 72-1107, was taken under advisement. In any event the only parties against whom specific charges of discrimination were made are not parties in this proceeding.

The complaint in the case below recited eleven specific acts of alleged discrimination on the part of defendants, State's Attorney Berbling and investigator Shepherd. They were charged with failure to file warrants or to prosecute eight named white men who allegedly, on specific dates and at specific places, had threatened or assaulted some of the respondents. No other specific charges were made against any defendant.

tory] conduct", apparently devised as a substitute for the requirement of pleading with specificity.

The alleged conduct includes the following allegations: (a) the judges involved set bond in criminal cases by following an unofficial bond schedule without regard to the facts of the case or circumstances of an individual defendant, (b) they sentence black persons to longer criminal terms and impose harsher conditions than they do with respect to white persons who are charged with the same or equivalent criminal conduct, and (c) they require plaintiffs and members of their class to pay for a trial by jury when charged with violations of city ordinances which carry fines and possible jail penalties, if the fine cannot be paid (A2, 30 par's. 36(a), (b), (c)).

Though the Amended Complaint alleges in paragraph 36(b) that O'Shea and Spomer sentence black persons to longer terms and impose harsher conditions than for white persons similarly charged, *the Complaint does not mention a single instance of such conduct in the past nor does it charge that any sentences were not within the judges' lawful discretion.* Indeed, no plaintiff is alleged to have been among those charged, bailed or sentenced. Furthermore, no plaintiff is alleged to be threatened with the possibility of requiring bail or being subjected to sentence. Plaintiffs do not set forth any facts or allege a single instance of improper bail procedure or excessive sentence in the Amended Complaint. Moreover, no other allegation in plaintiffs' capacious Amended Complaint evidences or supports the conclusory allegations in the Sixth Claim for Relief. (A2, 30-3)

The plaintiffs additionally do not indicate any request for relief either by *habeas corpus* or appellate review which has been made by any member of their class or *by anyone else* for any past judicial discrimination by either

Spomer or O'Shea. In the absence of any specificity as to alleged past conduct it can only be surmised that the language used in the complaint expresses a conjectural apprehension of possible discrimination in the future, not grounded upon any facts. This is borne out by the prayer for relief which asks to enjoin the judges "from depriving plaintiffs of their constitutional rights as set forth in paragraph 36".

The allegations regarding the setting of bonds and the payment for jury trials do not state that respondents are treated differently than any other persons. It is merely averred in general terms that petitioners follow an unofficial bond schedule in criminal cases; no charge is made, as has been done with respect to sentencing practices, that there exists discrimination in the treatment of white and black persons.[3] In addition, the Court of Appeals itself expressed doubt as to the meaning of the allegation concerning the payment for jury trials. (See footnote 1, page 5, of the Court's Opinion (A1, 6)). In sum, the sole issue as drawn by the pleadings relates only to allegation (b) above, i.e. a judge's discretionary role in imposing sentence on a lawfully convicted defendant. The complaint is completely barren of any factual averment involving judges and contains only one allegation of discrimination by judges—that in paragraph 36(b) of the Amended Complaint, which is alleged only on information and belief.

The District Court dismissed the Complaint on March 23, 1971, on the grounds that (1) it lacked jurisdiction to entertain a cause seeking to have a federal court substitute its judgment for the judgment of the state judiciary, and (2) in the regular performance of judicial officers' duties, judicial immunity barred relief in an action under the Civil

3. Respondent's Brief in Opposition misquotes the record by stating that the judges followed "an unofficial bond schedule applicable to black persons". No such charge appears in either the original Complaint or Amended Complaint.

Rights Act. (A copy of the District Court's opinion is set forth in the Appendix to the Petition for Certiorari (A1, pp. 56-60).) On October 6, 1972, the Court of Appeals, in a two to one decision, reversed the judgment of the District Court, and ruled that a federal district court may entertain actions requiring federal supervision and regulation by mandatory injunction over the discretion which state court judges may lawfully exercise within the limits of authority granted to them by law. The Court of Appeals held that: (1) the Complaint stated a cause of action against these petitioners cognizable under 42 U. S. C. §§ 1981, 1983 (and perhaps § 1982), and (2) the doctrine of judicial immunity did not extend to defendants in light of the legislative history of the Civil Rights Acts of 1866 (April 9, 1866, 14 Stat. 27) and the Ku Klux Klan Act of 1871 (April 20, 1871, Ch. 22, 17 Stat. 13) where injunctive relief is sought.

The Seventh Circuit, recognizing that its holding created a case of first impression, volunteered guidelines which the federal district court might follow in imposing upon state judges a system of reporting their conduct and disposition of their cases to the district court. The Court said:

> We do not mean to require the district court to sit in constant, day-to-day supervision of either state court judges or the State's Attorney. An initial decree might set out the general tone of rights to be protected and require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints. Nevertheless, we have complete confidence in the district court's ability to set up further guides as required and if necessary to consider individual decisions. (A1, 46).

The opinion is reproduced in the Appendix to the Petition for Certiorari (A1, pp. 1-55).

SUMMARY OF ARGUMENT.

The plaintiffs, consisting of 17 black persons and 2 whites, allege that they have been denied their civil rights under 42 U. S. C. §§ 1981-5 at the hands of defendant Illinois state judges, although no plaintiff or any member of the class has ever been before those judges in a judical proceeding. The record presently before this Court does not support a judgment against these state court judges, and plainly reveals plaintiffs' lack of standing.

The Complaint requests the District Court to enjoin these members of the Illinois judiciary from discriminating in a future case, based upon the nebulous and conclusory statement that they "engage in a pattern and practice" of discriminatory conduct.

The salutary doctrine of judicial immunity obviates all civil liability sought against members of the judiciary. This concept is well founded in the jurisprudential history of the United States. Defendant judges are no less intimidated by an action for injunctive relief in the District Court than they would be in a damage action suit to impose liability for a judicial act. Subjecting state judges to equitable proceedings in the District Court in Section 1983 actions, would be to chill judicial discretion and independence at the state level and place the state judicial system in receivership.

ARGUMENT.

Judges Michael O'Shea and Dorothy Spomer, the defendants herein, respectfully pray that the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on October 6, 1972, be reversed, at least insofar as these defendants are

concerned. In support of said prayer, defendants respectfully submit the following comments and arguments.

I.

Under Our Dual System of Federal and State Courts, the Proper and Independent Functioning of a State Court Judge Is Assured by the Principles of Comity, Federalism and Mutual Respect. Under Those Doctrines, a State Court Judge, in the Exercise of His Discretionary Powers, Is Not Subject to Interference and Regulation Merely Because He Holds a State Office or Because Someone May Speculate That in the Future He Might Engage in Discriminatory Conduct Against Some Unknown and Unnamed Individual. Under Those Principles, the Record Here Does Not Support the Judgment Against These Defendants.

At the outset, it should be noted that the record now before this Court in Cases No. 72-953 and 72-955, set for argument in tandem, has an entirely different posture than the record in this proceeding when considered by the court below.

As pointed out in the Statement of the Case, the Amended Complaint, in four separate claims, named as defendants, State's Attorney Berbling and his investigator Shepard; one claim was directed against the present defendant judges in the same Illinois county.

Eleven specific acts of alleged discrimination on the part of defendants Berbling and Shepard referred to the supposed failure to file warrants or to prosecute eight named white men who allegedly, on specific dates and at specific places, had threatened or assaulted some of the plaintiffs. The Complaint, however, did not contain a single specific charge against either of the judges, but only general and conclusory allegations.

As noted also in the Statement of the Case, defendants Berbling and Shepherd, the only defendants against whom

specific charges of misconduct had been made, are not parties to this proceeding, since their petition for writ of certiorari, in Case No. 72-1107, was taken under advisement by this Court.

The only persons presently before this Court are the two judges, petitioners in No. 72-953, and W. C. Spomer in No. 72-955. Petitioner W. C. Spomer was elected in November 1972 as State's Attorney to replace the defendant Berbling. Spomer, of course, was not named in the original action; he had no official capacity as a state officer when the alleged misconduct occurred, and, insofar as this record is concerned, never performed an official act or been subject to the slightest charge of discrimination. Unless he is subject to regulation solely because he is an elected state officer, succeeding a state officer against whom charges had been made, there is no possible basis on which the judgment below could apply to him.

Plaintiffs, however, assert on page 6 of their Brief in Opposition to the petition filed by W. C. Spomer as Case No. 72-955 that he is subject to regulation merely because he is now a state officer. On page 6, that Brief states: "Spomer was automatically substituted as a party to the extent the cause affects the Office of State's Attorney . . . Respondents seek only equitable relief against the petitioner W. C. Spomer". Equitable relief cannot be ordered against a state office, but only against individuals themselves guilty of misconduct. The original complaint on which the judgment was rendered was drawn on that theory and alleged the defendants had individually been guilty of specific acts of misconduct, or as to the judges, that it was speculated they had a predisposition to discriminate. Plaintiffs now blandly state that if *any* state's attorney was charged with discrimination, his successor, merely because he holds the same state office, is subject to equitable regulation, without any allegations or proof that he had

ever done anything wrong or even thought of doing anything wrong.

On this record the judgment below is equally inapplicable to these judges as defendants. As noted in the Statement of the Case, the only charge alleging discrimination (despite the misquotation by respondents)[4] was in Paragraph 36(b), alleging that these judges sentence black persons to longer terms and impose harsher conditions than they do with respect to white persons similarly charged. The complaint does not mention a single instance of such conduct in the past nor does it charge that any sentences given to anyone were not within the defendants' lawful discretion. Even that sentencing allegation was made only on information and belief.

The complaint does not allege that any of the eight whites allegedly favored by Berbling or Shepherd had ever been in court before either of these defendants nor does it allege that any of the plaintiffs had ever been arrested, admitted to bail, tried or sentenced before these judges. Indeed, the complaint fails to allege that any specific individual had ever been arrested, tried or sentenced in the past. Thus it fails completely in alleging any specific facts against the two judges.

The Court below (AI, 2) said it must "consider all of the factual allegations to be true, resolving any doubts in Plaintiffs' favor". On page 6 of the Appendix I the opinion states ". . . in Civil Rights Act cases, highly specific factual averments are required to defeat a motion to dismiss, otherwise every complaint against a state official by the simple expedient of averring conclusions would be cognizable in the federal courts. . . ." Yet, there was not a single factual averment as to trials or sentences in the

4. On page 5, Respondents' Brief in Opposition misquotes the record by stating the judges followed "an unofficial bond schedule applicable to black persons." No such charge appears in the complaint.

past but only what amounted to a request that the court enjoin the conjectural possibility of discrimination against someone in the future. In addition, there were no averments whatever as to discrimination in setting bonds or requiring juries.

This Court said in *Boyle* v. *Landry*, 401 U. S. 77 at 81 (1971):

> . . . **the normal course of state criminal prosecution cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future.** The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here. [Emphasis Added.]

These words apply with equal force to the case at hand. As far as these defendants are concerned, the generalized allegations in the complaint never reach the level of specific factual averments and are nothing more than flimsy, contrived "speculation about the future."

A further comparison between the *Boyle* case and the situation presented here is revealing. This Court said in *Boyle* (401 U. S. 77 at 80):

> Not a single one of the citizens who brought this action had ever been prosecuted, charged or even arrested under the particular intimidation statute . . .

On page 81, this Court continued:

> . . . the complaint contains no mention of any specific threat . . .

Exactly the same is true in the present case as far as the judges are concerned.

It seems clear that the court below in its zeal to find against Berbling and Shepherd on the basis of the documented charges made against them, apparently on the theory of "guilt by association", entered a similar judg-

ment against the judges, although on its own test there were no "highly specific factual averments" directed against them.[5]

That the plaintiffs rely solely on "speculation about the future"—expressly barred by this Court, in *Boyle* v. *Landry, supra,*—is shown by the amazing statement on page 11 of their Brief in Opposition that ". . . Berbling (and W. C. Spomer as his successor) as state's attorney . . . *use* their official positions to engage in a systematic pattern of discrimination. (Emphasis added.)

This attack on W. C. Spomer, newly elected State's Attorney and petitioner in 72-955, is characteristic. It demonstrates the display of feelings, not facts. According to plaintiffs, any state official in the area, though he has just taken office and not even performed a single official act, is *a priori* suspect; it is presumed, without the slightest factual basis, that he will engage in acts of discrimination in the future. It is respectfully submitted that such conjectural clairvoyance is no substitute for facts and cannot possibly form the foundation for the regulation of the state official's future conduct by an equity court. Were it otherwise, the most primitive principles of justice and equity jurisprudence would be violated.

State judges and state's attorneys are sworn to uphold the law. When it is contended that some state law is invalid, action is available to prevent its enforcement. Yet, state judges and state's attorneys are not subject to regulation by the federal courts merely because they hold a state office

5. See also *Robinson* v. *McCorkle,* 462 F. 2d 111 (3rd Cir., 1972) where the Court held that such allegations must be specific and there must be a "clear showing of invidious, purposeful and intentional discrimination between classes or individuals." (citing cases.) This requirement has been applied to the other areas of the Civil Rights Act: see: e.g., *Negrich* v. *Hohn,* 379 F. 2d 213 (3rd Cir., 1967); *Mercedes* v. *Barrett,* 453 F. 2d 391 (3rd Cir. 1971); *United States ex rel. Hoge* v. *Bolsinger,* 211 F. Supp. 199, 201 (W. D. Pa. 1962), aff'd 311 F. 2d 215 (3rd Cir. 1962), cert. denied 372 U. S. 931 (1963).

and someone speculates that they may possibly act in violation of their oath and duty at some time in the future.

It should be mentioned in this connection that the Illinois Constitution provides unusually broad procedures to investigate any alleged improper conduct of judges.[6]

Under these constitutional provisions, anyone of the plaintiffs could have filed a complaint had there been any improper conduct of either of these judges. Such a complaint would be investigated without cost to the complainant by a non-partisan board consisting of seven laymen and two judges. If the complaint had substance, proceedings to censure, suspend or remove the judge would be filed with the Courts Commission.

These constitutional provisions were designed to permit an early thorough investigation by an impartial board of any complaint that a judge had acted improperly. The complaint in this case not only failed to allege any specific act of alleged discrimination against either of these defendants, but likewise failed to allege that any federal court action by *habeas corpus* had become necessary, that any appeal in a state court had ever been taken, or that any

6. The Constitution of Illinois in Article VI, Section 15, provides, in part:

> (b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party.
>
> (c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute . . . The Board shall prosecute the complaint.

complaint had ever been filed against either of these judges either by any of the plaintiffs or by anyone else who had appeared before them in their official capacity. The complete absence of any such allegations indicates that the complaint was truly based on "flimsy allegations" which did not warrant interference by a federal court.

Under these circumstances it is respectfully submitted that no possible equitable relief may be granted against these judges, necessitating thereby as to them a reversal of the judgment of the Court of Appeals, apart and aside from the principles of judicial immunity, as interpreted by this Court.

II.

Members of the Alleged Class Have Suffered No Injury by Actions of Either Judge, and, Hence Have No Standing in Court.

Some members of plaintiffs' class have specifically alleged instances of discrimination against State's Attorney Berbling and investigator Shepherd, yet none of them has claimed, alleged or inferred that he or she has been before Judges Spomer or O'Shea and has been subjected to discrimination. While these defendants do not wish to engage in a discussion regarding the possible sufficiency of the class in relation to Berbling (now W. C. Spomer) and Shepherd, they do submit that plaintiffs have not fulfilled the requirements of a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure; hence, they have no standing to maintain the present action against the judges herein. Persons who desire to represent a class must be able to show injury to themselves, and not injury that might eventually befall someone else. *Kansas City, Mo.* v. *Williams,* 203 F. 2d 47 (8th Cir. 1953), cert. den. 346 U. S. 826; *Anderson* v. *Kelly,* 32 F. R. D. 355 (D. C. Ga. 1963); *Conley* v. *Gibson,* 29 F. R. D. 519 (D. C. Tex. 1961);

and *Wilson* v. *Kelley*, 294 F. Supp. 1005 (D. C. Ga. 1968), affd. 393 U. S. 266. No such injury was shown to have been suffered by any member of the class; the class which they allegedly represent must be gauged by the same yardstick *and* criterion of lack of direct injury.

In *Sierra Club* v. *Morton*, 405 U. S. 727, 31 L. Ed. 636 (1972), this Court has held that a suit for declaratory and injunctive relief may not be maintained if the person suing claims merely a "special interest" in the action and does not show that he himself has suffered or will suffer any injury, economic or otherwise. There the Sierra Club, a nationwide conservationist group, sought to enjoin federal officials from approving an extensive skiing resort development in Mineral King Valley. Holding that the group had no standing to seek relief, this Court declared that the requirement of injury did serve "as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." (31 L. Ed. 2d at 646) Indeed, that goal would be undermined if the Administrative Procedure Act were construed to authorize judicial review "at the behest of organizations or individuals who seek to do no more than vindicate their own preferences through the judicial process." (31 L. Ed. 2d at 646) This Court also referred in a footnote (footnote 16, 405 U. S. at 31 L. Ed. 2d at 646) to de Tocqueville's observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury. (1 Democracy in America 280 (Alfred A. Knopf, 1945).)

Although these statements were made with respect to a case which was viewed in the light of the provisions of the Administrative Procedure Act, the principles enunciated there have general application and are determinative in every instance in which a plaintiff's standing is contested

before a judicial tribunal. Unless a plaintiff has suffered a direct injury, he has no standing to complain of a defendant's conduct. Here the plaintiffs complain, with respect to the judges, of conjectural conduct which never might occur. Indeed, all that can be hypothesized from the complaint against these judges is a desire to have the federal court provide binding guidelines for these state judges commanding them how to proceed *in the event* that any of the class might commit a criminal offense in the future and appear before those judges. Yet, that possibility, built upon the abstruse idea that the plaintiffs will engage in criminal activities at some future time, cannot give them the legal standing to assert a present right. Discarding change-of-venue procedures, habeas corpus, or appellate review if such presumed eventualities might ever materialize, the stark fact remains that at the present time under the existing posture of the record, plaintiffs have not suffered any injury from the hands of the judges, and therefore, are asking the federal court in effect for an advisory opinion whether that court believes that the judges involved might engage in discriminatory acts against someone in the future. Thus no present actual controversy exists between these parties. It is therefore respectfully submitted that plaintiffs' claim for an adjudication of speculative, hypothetical situations, is highly improper and not maintainable.

III.

The Common Law Doctrine Providing Civil Judicial Immunity for Judicial Acts Was Not Abolished by Congresisonal Civil Rights Enactments, Regardless of Whether Damages or Mandatory Injunctive Relief Is Sought.

A.

The Decision Below Permits the Intimidation of State Court Judges and Deprives the State of an Independent and Intellectually Free Judicial System.

In reliance upon what it conceived to be an historical imperative, the Seventh Circuit has held that a federal district court may entertain actions against state judges for permanent injunctions under 42 U. S. C. §§ 1981-5 which require supervision and regulation by the district court. That decision places before this Court the task of accommodating two important jurisprudential principles now on a collision course—the necessity of vindicating Article III jurisdiction, 42 U. S. C. § 1983, and the necessity of maintaining a harmonious federal-state relationship. Forming the backdrop of any such accommodation is the "brooding omnipresence" of a principle that antedates our Constitution but which has remained as an integral part of our historical and judicial heritage: the desirability of a judiciary that is intellectually independent and totally free from intimidation in the exercise of its judicial function.

The reasoning in the old case of *Bradley* v. *Fisher*, 13 Wall. 335, 80 U. S. 649, 650 (1871) is no less potent today as it was at the time of its decision:

> . . . For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself.

> Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. *Taaffe* v. *Downes,* 3 Moore, P. C. 41, n.
>
> * * * * *
>
> Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. . . .[7]
>
> * * * * *
>
> If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

The sanctions of contempt are as dangerous to judicial independence as the risk of a suit for money damages. One cannot visualize a more dramatic example of judicial (subordination) bondage than the spectacle of having a state judge (circuit, appellate, or supreme) dragged into a fed-

7. Lord Coke in 1608 reported the case of *Floyd* v. *Barker* (12 Coke 25) where the court held that judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, lest such charges would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations."

eral district court on a claim for injunction, put to the ignominy of having to sit on the witness stand, defend the integrity of his character and actions, and be subjected on cross-examination to the verbal onslaught of a class of people who had never been before him at any time.[8] While on that federal stand, the state judge would be compelled to recall his past decisions and the reasoning behind those decisions; for, in an instance like the present one, a judge may not only be on trial with respect to an individual case, but for "patterns and practices" which comprise within their purview many decisions, extending through a number of years.

The effect of the decision of the Seventh Circuit will be to "chill" judicial discretion in the dispensation of justice in the State of Illinois; in effect, then, a state judge will have to "look over his shoulder" each time he exercises his judicial discretion for fear that by some nebulous standard of statistical analysis he has not meted out "justice" in accordance with a federal district judge's personal formula. In addition, a state judge would be more likely to qualify or balance sentences or amounts of bail, not in accordance with what the circumstances may have warranted, but out of the nagging fear that leniency or strictness (irrespective of whether deserved) over a period of time would be interpreted as deliberate discriminatory conduct.

Subjecting a state judge to federal review each time a dissatisfied but lawfully convicted defendant alleges class discrimination would require federal courts to conduct an evidentiary hearing to determine whether a pattern of discrimination existed. A judge operating under an abstruse

8. If, however, the case on federal review were an individual one, it is conceivable that the state judge would be confronted by a prisoner *in propria persona*, who had been sentenced to jail by the judge.

order not to discriminate in fixing bonds and sentencing would find himself confronted with the possibility of a federal contempt citation and the necessity to defend his motivation in each case. The burden on the federal system would be, in the least, cumbersome, and severe. The effect on the state system would be to create an oppressive atmosphere of federal supervision, cf., *Greenwood* v. *Peacock*, 384 U. S. 808 (1966), and render it oftentimes impotent.

The action countenanced by the court below will result in the federal courts sitting not only in review of state discretionary decisions but also as appellate tribunals passing ultimate judgment on state criminal proceedings. Though the action sanctioned here is civil, it requires the review of past *criminal* decisions. In addition, the likelihood is great that similar class actions would be taken to the district courts from state criminal actions on the grounds that the judge will or has a propensity to discriminate against a particular group. The result, then, would be to exchange state remedies[9] in favor of district court review.

In effect, then, the Seventh Circuit's position leads to the egregious result that any group (whether injured or not) may seek an injunction in federal court against a state judge[10], who in the group's opinion, has a past record of antipathetical inclination towards its members. Therefore, it is not too remote to propose that a group e.g. Mexican-American citizens, Italian-American citizens, Jewish citizens, Puerto Rican citizens, Irish-American citizens, white-Anglo-Saxon-American citizens, *ad infinitum*, could also compel a state judge to defend his discretionary past conduct before a federal district judge. In addition, it is

9. e.g. change of venue, appellate review, removal (See Argument p. 14, n. 6).

10. Assuming *arguendo* that judicial immunity no longer exists, then the horrendous prospect that *federal* judges would be subject to the same recriminations is totally probable.

not too remote to propose that minority judges would suffer the same fate based upon an alleged record of a predisposition toward another group. Extending the possibilities sanctioned by the Court below to its most absurd result, a state court judge could literally spend so much time defending his actions in frivolous suits at the federal bar that he could not perform his state judicial duties! See, especially, *Greenwood* v. *Peacock*, 384 U. S. 808 at 832 (1966).

It must be noted that the decision of the Court of Appeals for the Seventh Circuit does not limit its holding primarily to lower state court judges. Indeed, the application of the Seventh Circuit's decision renders *all*[11] state judges subject to injunctive relief should some class allege that they have engaged in "patterns and practices" which they feel violate their civil rights. Therefore, this decision, if it is allowed to remain in effect, could easily propel a rash of federal injunctive proceedings against a state appellate court based upon the naked allegation that the appellate justices (or any combination of them) engage in "patterns and practices of conduct" inimical to the civil rights of a particular class!

The unfitting burial given to the judicial immunity doctrine by the Seventh Circuit irrevocably alters the historic relationship that existed (1) between courts of equity and law, (2) between federal and state courts, and (3) between the judge and those persons appearing before him. The effect of permitting actions against the state judiciary, growing out of the exercise of lawful judicial discretion, would be to irreparably harm the administration of criminal justice at the state level.

Conspicuously, the Court of Appeals did not limit its decision to the particular facts at bar. Instead, it proffers

11. *"All"* includes federal and state judges, for, the abolition of the immunity doctrine renders *every* judge subject to intimidation and harassment.

a doctrine which extends to classes in all cases. This is best exemplified by an instance in which a group of persons decides that a particular judge has established a "pattern and practice" of conduct in e.g. commercial cases, or tort actions, which in light of the group's analysis constitutes discriminatory conduct. Indeed, the scope of the Seventh Circuit's decision exposes the determinations of *all* judges in *all* situations to federal injunctive review.

Defendant judges submit that no intellectually independent state judiciary could survive in an atmosphere of hostile litigants and constant federal supervision.

B.

There Is No Historical Basis for the Abolition of Judicial Immunity.

Holding that the venerable doctrine of judicial immunity did not extend to state judicial members in instances in which injunctive relief is sought, the Court of Appeals selectively recounted the history of the Civil Rights Act of 1866 (April 9, 1866, 14 Stat. 27) and the Ku Klux Klan Act of 1871 (April 20, 1871; ch. 22, 17 Stat. 13) (AI, pp. 12-16 and 17-20) as it appears substantially in *Monroe* v. *Pape*, 365 U. S. 167 (1961). The Court of Appeals surmised that the words "any person" in § 2 of the Civil Rights Act of 1866 seemed to include state judges and that in considering criminal sanctions Congress clearly had decided to eliminate judicial immunity (AI, 14). Yet, in reviewing the debates in their entirety it becomes clear that Congress became rent with discord on that subject. At least as far as state judges are concerned, the debates concentrated upon the issue whether a state court judge could be held criminally liable for the enforcement of state statutes which were discriminatory. The Court below even cited the comments of Illinois Senator Trumbull, the bill's principal sponsor, wherein he stated:

> . . . I admit that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an *illegal act*, may be and ought to be punished; but if he acted innocently, the judge would not be punished. [Emphasis added] (AI, 13, 14.)

It is evident that the Senator was referring to liability only if a judge was acting pursuant to a state law or custom which was illegally discriminatory. Statements of other Congressional members[12] and, in addition President Johnson,[13] who vetoed the bill, indicate that their objections were grounded upon this premise.

The case of *Monroe* v. *Pape*, 365 U. S. 167 (1961) decisively established the view that the "under color of law" provision of § 1983 applied to unconstitutional actions taken without state authority as well as to unconstitutional action authorized by the state. In that case police officers had searched a home without a warrant, and had arrested and detained the plaintiff without arraignment. They argued that they had acted outside state law, custom or usage and therefore had not acted under "color of" state authority, thereby preventing federal jurisdiction. This Court rejected that view decisively. However, *Monroe* did not discuss the doctrine of the judicial immunity exception to the Civil Rights Act and is not dispositive of that matter since that issue was not before the Court. The notion that *Monroe's* historical analysis has some bearing upon the topic of judicial immunity is dispelled by this Court's holding in *Pierson* v. *Ray*, 386 U. S. 547 (1967). Manifest in the historical analysis of *Monroe* is the absence of the debates concerning judicial officers and their immunities. Moreover, in light of *Bradley* v. *Fisher*, 13 Wall. 335 (1872),

12. Cong. Globe, 39th Cong., 1st Sess. (1866) Senator Cowan (Pa.) at p. 475; Senator Hendricks (Ind.) at 602; Mr. Raymond at 1267, Senator Johnson (Maryland) at 1778; Mr. Stewart (Ga.) at 1782.

13. Cong. Globe, 38th Cong. 1st Sess. (1866) at 1680.

and *Tenny* v. *Brandhove*, 351 U. S. 367 (1951), the extension of the doctrine in the *Monroe* decision to judges and legislators would have been evidenced in that opinion.

The question whether judicial immunity had been abolished by the Civil Rights Acts was answered by this Court in *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967). There this Court held that the common law immunity of judges from civil action for acts committed within their judicial jurisdiction was so settled a principle as to be excepted from the provisions of § 1983. Furthermore, this Court considered the very same legislative history, which the Court below held to be so incisive, and found that history wanting, so much so that it "gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Mr. Chief Justice Warren expressed the feelings of eight members of the Court when he wrote:

> . . . we presume that Congress would have specifically so provided had it wished to abolish the doctrine. 386 U. S. at p. 555.

Nothing in the explicit language of *Pierson* affords a basis to limit that holding to money damages, especially in light of the Chief Justice's compelling language which draws no distinction between monetary and equitable relief:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, *but he should not have to fear that unsatisfied litigants may hound him with litigation* charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation. [Emphasis Added] 386 U. S. at 554.

The Court of Appeals draws the narrow distinction that while judges are immune from damages suits, they may

be subjected to a mandatory injunction if ever anyone should charge them in the federal courts with class discrimination. Defendant judges submit that no distinction can logically be made as to judicial immunity between damages and an injunctive order for a judge's lawful exercise of his discretion.

There is nothing in either the legislative history or in the opinion in *Pierson* that could sustain the distinction upon which the Seventh Circuit based its conclusion that "when a class-discrimination is alleged, judicial officers may be enjoined." (AI, 31, 32) The language of the civil rights debates does not afford a basis for the conclusion that judicial immunity does not exist when a class action is alleged or when permanent injunctive relief is sought. Indeed, in *Pierson* there were fifteen plaintiffs, enough to constitute a class which, at least, and contrary to the present case, was clearly identifiable and not merely speculative. Therefore, irrespective of whether a suit is characterized as an individual action or a class action, and additionally, whether it takes the form of monetary or injunctive relief, the rationale of the immunity doctrine necessitates that it remain inviolate.

This Court established in *Bradley* v. *Fisher*, 13 Wall. 335 (1871) that the doctrine of judicial immunity has "a deep root in the common law,"[14] and that the purpose of that salutary doctrine was to assure the independence of judicial judgment by obviating personal liability. This principle "obtains in all countries where there is any well ordered system of jurisprudence." Indeed, in England it has been the settled doctrine for many centuries and remains unaltered today.[15]

---

14. Chancellor Kent observing that doctrine in *Yates* v. *Lansing*, 5 Johns., 291.

15. See: E. C. S. Wade and Godfrey Phillips, *Constitutional Law*, Longman Group Ltd., London, 8th edition, 1970; p. 330:

> It is a general proposition of the common law that no action will lie against a judge for any acts done or words

Since the division of law and equity is one peculiar to the common law countries, it should be emphasized in this connection, that nowhere in the historical development of equity jurisprudence did the equity courts assert the power to summon before them the judges of the law courts and to subject them to the processes of the equity courts for the exercise of their judicial functions.

Professor F. W. Maitland,[16] in lecturing his students about the historical conflict of law and equity said:

> Understand well that the Court of Chancery never asserted that it was superior to the courts of law; it never presumed to send to them such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must

---

spoken in his judicial capacity in a court of justice. "It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges shall be at liberty to exercise their functions with independence and without fear of consequences." [*Scott* v. *Stanfield* (1868), L. R. 3 Ex. 220 at p. 223] It can be argued from the authorities that the judge of a court of record is not liable for anything done or said in the exercise of his judicial functions, even if he exceeds his jurisdiction.

Scope of Immunity

In the case of acts done within the jurisdiction the immunity exists, however malicious, corrupt or oppressive be the acts or words complained of. Immunity does not attach to a ministerial, as opposed to a judicial, act. Thus an action lies for a wrongful refusal to hear a case, but not for a wrong decision. Moreover a judge is not liable where he exceeds his jurisdiction owing to a mistake of fact, unless he ought to have known the facts ousting his jurisdiction. A similar immunity to that of judges attaches to the verdicts of juries, and to words spoken by parties, counsel and witnesses in the course of judicial proceedings.

See also: D. Thompson, *Judicial Immunity and the Protection of Justices,* Modern Law Review, Stevens & Sons Ltd., 1958, p. 517.

16. See Maitland, F. W., *Equity*, a Course of Lectures, Cambridge Press, 1936, p. 9.

> not do that or quashing their proceedings—*the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judges,* but to the party. You in breach of trust have obtained a judgment—the Chancellor does not say that this judgment was wrongly granted, he does not annul it, he tells you that for reasons personal to yourself it will be inequitable for you to enforce that judgment and that you are not to enforce it. (Emphasis Added)

Later in his lecture on injunctions he added:

> I have already told you how this right of the Chancery was established in the reign of James I after the great quarrel between Coke and Ellesmere. It gave the Chancery the upper hand. The Chancellor could say to a person 'You must not go to a court of law,' and the court of law had no power to say 'You must not go to a court of equity.' Well, when the Judicature Acts came into force in 1875 all this came to an end. It was expressly enacted by the Act of 1873, s. 24(5), that no cause or proceeding at any time pending in the High Court should be restrained by prohibition or injunction. If in an action in the King's Bench Division—one of the old common law actions—the defendant has some equitable defence, he can plead it, and the court must listen to it and administer the rules of equity as well as the rules of law. However our Court still has power, and occasionally exercises it, to prohibit persons from suing in Colonial or foreign courts. *I say this because I wish to remind you that the Chancery never claimed any superiority over the Courts of Common Law. It could not send orders to them; but it could prohibit a person from going to them.* [Emphasis Added]

Though the unique character of American dual sovereignty separates the historical and traditional powers of equity from its American present-day counterpart, it is respectfully submitted that the basic principles of non-interference of the equity court with the exercise of judicial

functions of a judge of another court remains as vital and as necessary today as it was four hundred years ago. True, the statutory enactment of 42 U. S. C. § 1983 opened the doors of the Federal Courts and created new causes of actions in civil rights cases. Yet, § 1983 did not enlarge the traditional powers of equity. The historical conflict between the federal and state judicial systems, which is somewhat analogous to the conflict between law and equity courts has been accommodated by a healthy regard toward each judicial system's independence—namely, comity. Moreover, personal immunity of a judge from injunctive process related to the exercise of his judicial functions has remained a part of the American system of jurisprudence, as the Supremacy Clause has not been interpreted to include the assertion of power by the lower federal courts over the judicial conduct of state court proceedings.

C.

The Cases Speaking of the Abolition of Judicial Immunity Are Misconceived.

While admitting that the question of injunctive relief under § 1983 has been considered by only a very few courts (AI, 30), the Court of Appeals cited *United States* v. *Clark*, 249 F. Supp. 720 (S. D. Ala. 1965), *United States* v. *McLeod*, 385 F. 2d 734 (5th Cir. 1967), *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968) and *Bramlett* v. *Peterson*, 307 F. Supp. 1311 (M. D. Fla. 1969) as ample precedent for its holding. However, in the cases cited by the majority in which equitable relief has been granted, the relief has been in the form of a prohibitory injunction, confining the state officials to the limits of their legal authority. Judge Dillon persuasively argued in his dissent below (AI, 48) that "[T]here is a great difference between ordering an official not to do a particular act, measured by objective standards, and in ordering him to exercise

his discretion in a certain way, measurable only by subjective standards".

It is essential at this point to separate those cases which discuss judicial immunity from the standpoint of ministerial functions. These cases, best exemplified by *Ex parte Virginia*, 100 U. S. 339 (1879), and *Bramlett* v. *Peterson*, 307 F. Supp. 1311 (D. C. Fla. 1969), hold that judges may be enjoined where "the right guaranteed is particularly clear" and where a judicial officer "fails to exercise a mandatory, non-discretionary, ministerial duty."[17] See also *Hadnott* v. *Amos*, 394 U. S. 358 (1969) and *In Re Herndon*, 394 U. S. 399 (1969). Defendant judges do not quarrel here with the ministerial aspect of injunctive relief, but firmly disagree with the Seventh Circuit's extension of that rule of law to areas of judicial discretion.

U. S. v. *Clark*, 249 F. Supp. 720 (S. D. Ala. 1965) decided two years before *Pierson* v. *Ray*, 386 U. S. 547 (1967), held that a preventive injunction would lie against state judges where the United States sought an injunction under §206(a) of the Civil Rights Act of 1964, against interference with both the right to vote and interference with the rights of a citizen to use places of public accommodations. This seminal case, though never decided by a higher appellate court, dismissed out of hand the doctrine of judicial immunity and based its decision on *U. S.* v. *Wood*, 295 F. 2d 772 (5th Cir. 1961), *cert. denied* 369 U.S. 850. The relief granted, however, in *Wood* was grounded upon a mandatory injunction statute, 42 U. S. C. § 1971(b), where

17. Note that the Court in *Bramlett* limited its holding to circumstances where:

> "the rights guaranteed are particularly clear, [and] *there is no infringement of the judicial discretion;* rather this order affects the peace justice only if he fails to exercise a mandatory, non-discretionary, and ministerial duty." [Emphasis added.]

the right of action was given to the *United States* to prevent intimidation of citizens registered to vote. The question of immunity was not before the court.

Furthermore, the *Clark* court, while acknowledging principles of comity (at p. 729), pronounced that "no state official is immune from having his conduct challenged . . ." citing *Cooper* v. *Aaron*, 358 U. S. 1; *Lucas* v. *Forty-Fourth General Assembly of the State of Colorado*, 377 U. S. 713; *Sterling* v. *Constantin*, 287 U. S. 378; *Bush* v. *Orleans Parish School Board* (E. D. La., 1960), 187 F. Supp. 42, aff'd 365 U. S. 569; and *In Re Wallace*, 170 F. Supp. 63 (M. D. Ala., 1959). Yet, *Clark*, under the aegis of 42 U. S. C. § 1971 of Title II of the 1964 Act (not § 1983), acknowledged that no interference with judicial discretion occurred since the action taken was merely to *prevent* trial, not to interfere with the judge's control of it.

The *Clark* opinion is a classic example of dictum-run-rampant, and the elevation of sweeping, conclusory statements, bereft of supporting rationale, to substantial case precedent. This string of Supreme Court and lower court cases cited in *Clark* as ample precedent for the imposition of federal injunctive interference, does not stand for the asserted proposition. *Cooper* referred to action of the Little Rock School Board; *Lucas* involved "various officials charged with duties in connection with state elections," 377 U. S. at 713; *Sterling* involved a governor; *Bush* a school board. In citing *Wallace*, the *Clark* court misapprehended and misconceived the scope of judicial immunity. Judge Wallace, in that case, had refused to respond to a subpoena *duces tecum* from the Commission on Civil Rights, invoking judicial privilege. District Judge Frank M. Johnson carefully drew the lines between the performance of a purely ministerial act and judicial immunity, stating (170 F. Supp. 63 at 68, 69):

> Such a subpoena, a subpoena duces tecum, requires no testimony, only production of records. Such production can be made, if he sees fit, by clerks or agents.
>
> • • • • •
>
> Thus this Court now concludes that judicial status does not confer a privilege upon Judge Wallace to disregard the positive command of the law. . . . *This does not mean to say or imply that a judge is not immune from investigation or inquiry into his judicial acts; he is.* [Emphasis Added.]

The *Clark* opinion as applied by the Court of Appeals for the Seventh Circuit, stands as a monumental example of jurisprudential incantation—the singling out of an act of judicial discretion and defining it in terms of acts of a ministerial nature, then extending that analysis to all acts of judicial discretion.

United States v. *McLeod*, 385 F. 2d 734, 738 n. 3 (5th Cir. 1967), citing *Pierson* in a footnote and recognizing *Clark* in the text, concerned the arresting and prosecuting of Black citizens who had been active in voter registration. The facts of *McLeod* demonstrated that local officials had harassed and attempted to intimidate Black citizens from exercising their right to vote. Under the provisions of 42 U. S. C. § 1971(b), the United States sought an injunction to prevent prosecution of these arrested persons because prosecution violated § 1971(b), since the trial judge did not decide the case on the statutory standard as he was required to do. Yet, except for a terse conclusory comment in a footnote regarding judicial immunity, that Court's analysis of the immunity doctrine is devoid of any express analytical support.

The Seventh Circuit referred briefly to *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968) as demonstrative of the issue before this Court (A1, 32). However, in *Phillips*, the plaintiffs were engaged in civil rights activities and

sought injunction against two state judges and their successors for failure to advise them of their right to counsel. Apart from the fact that this case clearly involved a ministerial duty, it was a preventive injunction which was issued to compel the justices to perform a *ministerial* duty, the absence of which violated the Sixth Amendment. Any critical reading of *Phillips* reveals that the question of judicial immunity was neither raised nor adjudicated. Indeed, the dispositive analysis of that case centered on principles of comity, tested by the standard of the pre-*Younger*[18] case of *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943).

Other cases which have often been cited in support for the demise of the immunity doctrine, demonstrate upon critical analysis their lack of legal and historical depth. Thus, *Clark* was blindly followed in *Cassidy* v. *Cecci,* 320 F. Supp. 223 (E. D. Wis. 1970), and *Stambler* v. *Dillon,* 288 F. Supp. 646, 649 (S. D. N. Y. 1968), both in a one-sentence discourse on judicial immunity. The case of *Koen* v. *Long,* 302 F. Supp. 1383 (E. D. Mo. 1969), found that judicial immunity did not apply in an injunction procedure, but based its ruling upon *Ex parte Virginia,* 100 U. S. 339 (1879), which, as previously pointed out, dealt only with *ministerial* acts. *Smith* v. *Hill,* 285 F. Supp. 556 (E. D. N. C. 1968) is a case of dubious precedent value, since the defendant judges in that case did not appear at pre-trial nor file an answer to the motion for summary judgment. *Smith* proceeded *ex parte,* and did not raise the issue of judicial immunity at all. The case of *Haley* v. *Troy,* 338 F. Supp. 794 (D. C. Mass. 1972) based its opinion upon *Koen, Stambler,* and *Hadnott* (ministerial acts).

Thus a careful reading of the decisions cited by the Seventh Circuit will reveal that they either deal with ministerial duties exercised by a judicial officer or do not

18. *Younger* v. *Harris,* 401 U. S. 37 (1971).

discuss the doctrine of judicial immunity or are ex parte proceedings in which the accused judges did not participate or are based upon a misapprenhension of other decisions utilized as precedents. Verily, the observation of Mr. Justice Frankfurter in *United States* v. *Rabinowitz*, 339 U. S. 56, 71, 75 (1950) is in point here:

> Of course in this field of law, as in others, opinions sometimes use language not with fastidious precision . . .
>
> * * * * *
>
> These decisions do not justify today's decision. They merely prove how a hint becomes suggestion, is loosely turned into dictum, and finally elevated to a decision.

These words apply with full force to the decision of the Court of Appeals.

D.

The Weight of Case Law Supports Judicial Immunity.

The essence of the rule of judicial immunity is the necessity for complete, unfettered, judicial independence and the desirability to avoid "imposing such a burden on judges [which] would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967). This Court decided in *Pierson* that "the legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Id. at 554. This conclusion was also reached by the Third Circuit in *Bauers* v. *Heisel*, 361 F. 2d 581 (1966). The underlying rationale of both these cases is the desire to protect judicial independence by barring *all* civil suits which have that effect.

Although an exhaustive study of injunctive relief under § 1983 was made by the Court below, the case of *MacKay* v. *Nesbett*, 285 F. Supp. 498, 502, 503 (D. C., Alaska, 1968), affd. 412 F. 2d 846 (1969), cert. denied 396 U. S. 960, was

overlooked. In that case an equitable proceeding was instituted, against a majority of the justices of the Alaska Supreme Court to have a final order suspending plaintiff from the practice of law for one year declared null and void and to enjoin its effect. Jurisdiction was invoked under the Civil Rights Act (28 U. S. C. § 1343), 42 U. S. C. § 1983, and under 28 U. S. C. § 1331. Upon consideration of a motion to dismiss, the district court evaluated the jurisdictional question on two grounds: (1) the anti-injunction statute, 28 U. S. C. § 2283, and (2) judicial immunity; it found either ground sufficient to grant dismissal. While the Court's position in *MacKay* as to 42 U. S. C. § 2283 is no longer tenable in the light of *Mitchum* v. *Foster*, 407 U. S. 225, 32 L. Ed. 2d 705 (1972), the Court's analysis of judicial immunity and § 1983 remains compelling.

Reaffirming the tenet of judicial immunity for judicial acts, the Court held that "[t]he Civil Rights Act creates no exception to this immunity," citing *Pierson* v. *Ray*, 386 U. S. 547, *Sires* v. *Cole*, 320 F. 2d 877 (9th Cir. 1963), *Johnson* v. *MacCoy*, 278 F. 2d 37 (9th Cir. 1960), and *Hagan* v. *State of California*, 265 F. Supp. 174 (C. D. Cal. 1967). It declared (285 F. Supp. 498 at 503):

> The doctrine of judicial immunity applies to a proceeding in which injunctive or other equitable relief is sought, as well as to suits for money damages. [Citations] The reasons for the rule of judicial immunity apply regardless of the nature of the relief sought.

In *Gay* v. *Heller*, 252 F. 2d 313, 315 (5th Cir. 1958), the Fifth Circuit applied the rule of judicial immunity in an action seeking both injunctive relief and damages. There the plaintiff alleged that judicial irregularities had deprived her of her civil rights under the Civil Rights Act. In disposing of the plaintiff's claim, the Court applied the rule of judicial immunity, adding that: "[t]he normal

way to correct errors in the trial or other disposition is by appeal, not by suing the judge." Additionally, in *Cade* v. *Carpenter*, 367 F. 2d 572 (5th Cir. 1966), that same Court held that a petition for habeas corpus directed a state judge (and not against the person holding him in custody) "fails to state a ground on which relief can be granted since the actions of the District Judge are protected by the bar of judicial immunity."[19] See also *Collins* v. *Moore*, 441 F. 2d 550 (5th Cir. 1971).

The Eighth Circuit has held that no action under 42 U. S. C. § 1983 lies against a judge for a declaratory judgment, injunctive relief, and money damages. *Tate* v. *Arnold*, 223 F. 2d 782 (8th Cir. 1955). In that case plaintiff class alleged that the judge was acting under color of law in issuing unlawful writs of garnishment before judgment. Alleging irreparable injury and a multiplicity of "unjust" suits, the members of the class stated that they were:

> ". . . entitled to an Injunction against Frank Arnold, Justice of the Peace, . . . perpetually restraining him from issuing, serving or executing against any employer of these plaintiffs, . . . without first requiring any and all creditors of anyone or all of the plaintiffs to file the requisite bond, ..."

Noting that the plaintiffs sought the recovery of only $500.00 from the defendant judge, the Eighth Circuit regarded the case in light of both injunctive and monetary immunity. The Court rejected plaintiff's theory that Congress intended to abrogate judicial immunity through the enactment of the Civil Rights Act, and held that the rule was so well founded in history, public policy and practical necessity that "we refrain from a further restatement of those expressions here."[20]

---

19. See also: *Gaito* v. *Ellenbogen*, 425 F. 2d 845 (3rd Cir. 1970).

20. See also: *Rhodes* v. *Houston*, 309 F. 2d 959 (8th Cir. 1962), aff'g 202 F. Supp. 624 (D. Neb. 1962).

IV.

The Decision Below Violates the Historic Comity Relationship Between Federal and State Judicial Systems.

Defendant judges submit that the decision below dilutes the effectiveness of the doctrine of comity. The Court of Appeals has held that though the principles of *Younger* v. *Harris*, 401 U. S. 37 (1971) do not control this civil action, if they did "the plaintiffs' allegations are sufficient to come within the 'exceptional circumstances test' . . ." (AI 34). Yet, the Amended Complaint makes only general and conclusory statements of bad faith; no concrete instance is mentioned. In addition, plaintiffs' claim of irreparable harm is illusory since not one member of the class has actually alleged or shown any injury. Moreover the vast array of state remedies available to plaintiffs under the State Constitution and statutes for any judicial misconduct negates most forcefully the existence of "exceptional circumstances" in the present case.

While reciting the recent case of *Mitchum* v. *Foster*, (at 718), the Seventh Circuit ignored this Court's statement:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger* v. *Harris*, 401 U. S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past. *Fenner* v. *Boykin*, 271 U. S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45; *Watson* v. *Buck*, 313 U. S. 387; *Williams* v. *Miller*, 317 U. S. 599; *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Steffanelli* v. *Minard*, 342 U. S. 117; *Cameron* v. *Johnson*, 390 U. S. 611."

In considering the removal power in civil rights cases, this Court held in *Greenwood* v. *Peacock*, 384 U. S. 808 at 827, 828 (1966), that the federal courts should generally not interfere with the state judicial process:

> It is *not* enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. *The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial.* Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicated by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel* [384 U. S. 780]; *Strauder* v. *West Virginia*, 100 U. S. 303. (Emphasis Added.)

In the recent case of *Lynch* v. *Snepp*, 472 F. 2d 769, 771 (4th Cir. 1973), the Fourth Circuit re-examined the scope of the comity doctrine and the question "to what extent the general notions of comity, equity and federalism, as exposited in *Younger* and its companion cases, apply in [the] civil context." There plaintiffs filed a suit against a state court judge and challenged, under 42 U. S. C. § 1983, the constitutionality of two orders issued by that judge. The plaintiffs sought a preliminary injunction against enforcement of the orders.

Recognizing the difficulty in maintaining a stable equilibrium between the dual sovereignties, the Court in *Lynch* said at p. 773:

> The interest in protection of constitutional rights pulls in one direction and the interest in preserving the rightful independence of state judiciaries pulls in the opposite direction.[21]

Because of the required sensitivity to the legitimate interests of both systems, this Court has had "to repeat time and time again that the normal thing to do . . . is not to issue such injunctions." *Younger* v. *Harris*, 401 U. S. 37 at 45.

The long-standing policy against federal court interference with state court proceedings is grounded in our jurisprudential history[22] and founded upon the rule that equity should not act when there exists an adequate remedy at law.[23] Since a state court and a federal court may each take jurisdiction of many issues, the tribunal which first exercises jurisdiction holds it to the exclusion of the other. *Taylor* v. *Taintor*, 16 Wall. 366 (1873). Therefore, it has been held that the jurisdiction first obtained by a state court should generally not be interfered with by the federal courts. *Ex parte Chetwood*, 165 U. S. 443 (1897); see also *University Day Care Center, Inc.* v. *Temple University*, 442 F. 2d 1116, 1118 (3rd Cir. 1971); and *Ganyer* v. *Peyton*, 379 F. 2d 710 (4th Cir. 1967).

The Court in *Lynch* after surveying the scope of comity held that interference with state proceedings does not de-

---

21. See: Comment, Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent, 38 U. Chi. L. Rev. 612-13 (1971).

22. See: Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States, 226, 299 (Freund ed., 1971).

23. See Argument III B, pp. 27-29. See also: *Younger* v. *Harris*, *supra* at 43-44.

pend on whether the state action is characterized as "civil or criminal." (Citing cases at p. 773.) The plaintiffs in *Lynch* did not show that the judicial machinery had been utilized in bad faith or for harassment.

This Court in *Mitchum* v. *Foster*, has recently passed upon the question whether 42 U. S. C. § 1983 constitutes an "expressly authorized" exception to the federal anti-injunction statute, 28 U. S. C. § 2283, which prohibits the federal courts from granting injunctions staying state court proceedings. Holding that § 1983 is an exception to 28 U. S. C. § 2283, this Court analyzed the historic foundation upon which the anti-injunction statute rests. Reconciling the civil rights provisions with the anti-injunction statute, this Court was prompted to reconsider the relationship between the federal and state governments. The Court said (32 L. Ed. 2d at 717):

> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial." Ex parte Virginia, 100 U. S. 339, 346, 25 L. Ed. 676, 679. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441; cf. Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7; Dombrowski v. Pfister, 380 U. S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116.

It must be noted that this Court did not consider the doctrine of judicial immunity as it had in *Pierson* v. *Ray*. There, this Court found that the doctrine of judicial immunity was an exception to § 1983. The significance placed upon this Court's holding in *Mitchum* v. *Foster* by the Court of Appeals for the Seventh Circuit is misplaced in that (1) *Mitchum* did not reach the question of judicial immunity and (2) this Court expressly held that judicial immunity was an exception to § 1983. The language in *Mitchum* that refers to the protection of federal rights against unlawful state action "whether that action be executive, legislative or judicial," is based upon the case of *Ex parte Virginia*, 100 U. S. 339 (1879), and must be understood and interpreted within the confines of that case.

In *Virginia*, this Court narrowly defined the limits to which its holding was to apply, saying (100 U. S. at 348):

> It was insisted during the argument on behalf of the petitioner that Congress cannot punish a state judge for his official act; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge . . . *it is merely a ministerial act*. . . . [Emphasis Added.]

The activities of Judge Cole in *Virginia* which were under scrutiny by this Court were "ministerial" and fully comport with the well settled rule that equitable relief was not barred where a purely ministerial function is involved.

Thus, the dictum in *Mitchum* v. *Foster* can in no way be interpreted as having overruled *Pierson* v. *Ray*, 386 U. S. 547 (1967) or having discarded the time-honored doctrine of judicial immunity.

Considering all these factors, even if it is assumed for argument's sake that the doctrine of judicial immunity has been abolished—indeed a horrendous thought—it is respectfully submitted that hardly any more appropriate set of circumstances can be visualized, calling for the exercise of abstention on the part of the federal courts, than the one presented in the case at bar.

The possibility that the district court could "require . . . periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints"[24] from the state courts, effectively circumvents the utilization of the various state corrective remedies and procedures dealing with the supposed judicial misconduct of judges and thereby deprives the people of the State of their right to deal with these matters, which primarily affect them, in their proper state tribunals; moreover, such possibility of injunctive action would vastly exceed the limits of *Younger* and effectively place the state courts in receivership. The result would be a clear violation of the healthy and traditional respect that the two judicial systems have held under the rules laid down in *Younger* v. *Harris*, *supra*.

V.

The Abolition of Judicial Immunity in Actions Seeking Permanent Injunctions Would Violate the Constitutional Guaranty to the States of a Republican Form of Government.

The Constitution of the United States provides in Article IV, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when

24. See: AI, 46 and Statement of the Case p. 7.

the Legislature cannot be convened) against domestic Violence." In the past, cases construing Article IV, § 4 have most commonly referred to the right of the people to choose their own officers for governmental administration, and pass upon their own laws. *Duncan* v. *McCall*, 139 U. S. 449 (1891). However, the scheme of government in the United States encompasses within its scope the legislative, executive and judicial branches and their rights to pass, administer, enforce, and interpet the laws of either the nation or the state. Mr. Justice Harlan in his dissent in *Taylor* v. *Beckham*, 178 U. S. 548, 609 (1899), said:

> The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate co-ordinate departments, legislative, executive, and judicial.

Recognizing this tripartite form of government, the founding fathers guaranteed to the states that this form of government would be secure in whatever form they choose to implement it. It has been held that a "republican form of government" includes the right to have a system of state courts. *United States* v. *Downey*, 195 F. Supp. 581 (D. C. Ill. 1961); and *Bauers* v. *Heisel*, 361 F. 2d 581 (3rd Cir. 1966). While these cases indicate that a judicial system is a necessary element to a republican form of state government, the courts have stated that the particular method of selection of state judges and the specific structure of the state judicial system is left to the states. *Holshouser* v. *Scott*, 335 F. Supp. 928 (D. C. N. C., 1971). In *Bauers* v. *Heisel*, 361 F. 2d 581, the Third Circuit declared that judicial immunity was essential to preserve to the states a republican form of government; the Court recognized that in order to preserve the freedoms offered by a democracy, an independent and effective judiciary is necessary (361 F. 2d 581 at 588-9):

> The framers of the Constitution clearly evinced their belief that a separate and independent judiciary is an indispensible element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 et seq., 494 et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary in the various States, and consequently deprive them of a republican form of government.

It is essential that the state judiciary remain free to pass upon its own laws without fear of federal district court surveillance. Where a pattern emerges, or is allowed to emerge, that state judicial officers can be summoned before a federal district court on the mere allegation of a pretended non-existent class (of which plaintiffs are not members) that they engage in some "pattern and practice" of conduct somehow inimical to the class, then the obvious result will be the destruction of the state judiciary and thereby of the republican form of government.[25]

Thus it becomes evident that the transfer of the power to review state court judicial behavior from the state appellate system to the federal district court, denies to the state the ability to effectively exercise independent judgment regarding the conduct of its judicial officers and their decisions. The discipline of Illinois state court judges is placed in the hands of the federal district courts, rather than the people of the state by whom they are elected; this, in turn, presages the egregious circumstance of unsatisfied litigants using the federal district courts as courts of appeal—a fact destructive of our governmental system.

---

25. See Note, 66 Harv. L. Rev. 1285, 1296, n. 54 (1953).

CONCLUSION.

For the above reasons, defendant judges respectfully pray that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed as to them, and that this Court hold that the doctrine of judicial immunity protects all judges in the performance of judicial acts.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North LaSalle Street,
Chicago, Illinois 60601 (793-3500),
Attorney for Petitioners.

ROBERT J. O'ROURKE,
Deputy Assistant Attorney General,

FRED F. HERZOG,
First Assistant Attorney General,

JOHN W. FREELS,
Special Assistant Attorney General,

JERRALD B. ABRAMS,
Assistant Attorney General,
Of Counsel.